

1 Carl J. Oreskovich, WSBA #12779
2 Andrew M. Wagley, WSBA #50007
3 Etter, McMahon, Lamberson,
4 Van Wert & Oreskovich, P.C.
5 618 West Riverside Avenue, Suite 210
6 Spokane, WA 99201
(509) 747-9100
(509) 623-1439 Fax
7 Email: carl@ettermcmahon.com
8 Email: awagley@ettermcmahon.com
9 *Attorneys for Defendant Ronald C. Ilg, MD*

11 UNITED STATES DISTRICT COURT
12 EASTERN DISTRICT OF WASHINGTON
13

14 UNITED STATES OF AMERICA,
15 Plaintiff,
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17 v.
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19 RONALD CRAIG ILG,
20 Defendant.

22 Case No. 2:21-cr-00049-WFN

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**REPLY IN SUPPORT OF
DEFENDANT'S MOTION TO
EXCLUDE ALLEGED DARK
WEB MESSAGES AND WEBSITES**

Ronald C. Ilg, MD (“Dr. Ilg”) submits the following Reply in Support of Defendant’s Motion to Exclude Alleged Dark Web Messages and Websites:

A. Admission of the Alleged Dark Web Messages, Transcript, and Dark Websites Violates the Confrontation Clause.

The Confrontation Clause of the Sixth Amendment requires “that reliability [of testimonial evidence] be assessed in a particular manner: by testing the

1 crucible of cross-examination.” *United States v. Esparza*, 791 F.3d 1067, 1071
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 3 (9th Cir. 2015). The Confrontation Clause applies when the Government offers:
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 5 (1) “testimonial statements,” (2) for “the truth of the matter asserted,” and (3)
 6 absent “a prior opportunity for cross-examination.” *Crawford v. Washington*,
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 8 541 U.S. 36, 59 n. 9, 68 (2004).

9
 10 The Government appears to only dispute whether the dark web messages
 11 are “testimonial.”¹ (See ECF No. 127 at 3.) In determining whether evidence is
 12 “testimonial,” the Confrontation Clause calls for an objective test—whether the
 13 statement was “made under circumstances which would lead an objective
 14 witness reasonably to believe that the statement would be available for use at a
 15 later trial.” *United States v. Bustamante*, 687 F.3d 1190, 1194 (9th Cir. 2012).

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 18 In other words, to be testimonial the “primary purpose” must be to “establish or
 19 prove past events potentially relevant to later criminal prosecution.” *United*
 20 *States v. Vo*, 766 Fed. Appx. 547, 549 (9th Cir. 2019) (unpublished). Statements
 21 through various mediums may be “testimonial” if the primary purpose test is
 22 met. See *Bustamante*, 687 F.3d at 1191 (“document appearing to be a
 23 transcription of [defendant’s] birth certificate” testimonial); *see also United*
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 30 ¹ To the extent the Government also argues that the dark web messages are
 31 offered for context (i.e., not the truth of the matter asserted), that argument is
 32 addressed *infra* in the section regarding hearsay.

States v. Cameron, 699 F.3d 621, 644 (1st Cir. 2012) (records were “testimonial” as “the primary purpose of the CP Reports was to establish[] or prov[e] past events potentially relevant to later criminal prosecution”).

The Government argues that the dark web messages are not “testimonial” as “[n]one of these communications were to law enforcement, and neither Defendant nor the dark web administrators created these messages in anticipation of litigation.” (ECF No. 127 at 4.) However, the dark web messages were allegedly sent via “fake” websites operated by an unknown “person/group” to investigate (and document) murder for hire transactions on the dark web. (ECF No. 121-1 at 8.) The Government’s argument ignores various portions of the conversation where the unknown source(s) allegedly confirmed the job had been received, repeated the parameters of the bonus, and verified bitcoin transaction. (*See* ECF No. 107-1; ECF No. 107-3.) In this vein, the unknown source(s) statements were objectively testimonial as the primary purpose was to create evidence and documentation of the conversation. *See Vo*, 766 Fed. Appx. at 549. Additionally, testimonial statements clearly do not have to be to law enforcement to satisfy the primary purpose test.

1 As such, the dark web evidence is testimonial and Dr. Ilg has a Sixth
 2 Amendment right to confront the unknown source(s)² who were involved in the
 3 alleged dark web messages and created the scam websites.
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6 **B. The Government Cannot Authenticate the Alleged Dark Web**
 7 **Messages, Transcript, and Dark Websites.**

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9 In relation to authentication, the Government bears the burden to “produce
 10 evidence sufficient to support a finding that the item is what the proponent
 11 claims it is.” Fed. R. Evid. 901(a). The Government’s burden is two-fold, it
 12 must: (1) “make a *prima facie* showing” that “a reasonable juror could find in
 13 favor of authenticity,” and (2) “establish a connection between the proffered
 14 evidence and the defendant.” *United States v. Tank*, 200 F.3d 627, 630 (9th Cir.
 15 2000). Concerns regarding manipulation of electronically stored information
 16 should be substantially magnified based upon the nature of the dark web. *See*
 17 *United States v. Browne*, 834 F.3d 403, 412 (3d Cir. 2016) (“The authentication
 18 of electronically stored information in general requires consideration of the ways
 19 in which such data can be manipulated or corrupted.”).

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² To the extent the Government argues that cross-examination of FBI Special Agent Richard Barker satisfies the Confrontation Clause, it ignores the unknown source(s) who created the testimonial statements. (*See, e.g.*, ECF No. 127 at 4.)

1 In the context of electronic evidence, private websites are not self-
 2 authenticating and authentication by circumstantial evidence still requires
 3 verification of the electronic medium of communication (*i.e.*, the website) via a
 4 witness with direct knowledge. As such, in order to authenticate the dark
 5 websites, the Government must produce a witness with direct knowledge
 6 regarding the operation, innerworkings, and/or server of the websites. Dr. Ilg
 7 hereby incorporates via this reference his analysis of various authorities
 8 contained in his opening Motion. (*See* ECF No. 119 at 16-18.)

14 In the Government's Response, it severally underplays the importance of
 15 the dark websites in relation to authentication of the purported messages. Here,
 16 **every single one of the alleged messages were purported to have been sent**
 17 **through the dark websites.** Just because circumstantial evidence may be
 18 argued to authenticate text and/or social media messages, the medium itself must
 19 still be authenticated and trustworthy. The Government acknowledges that it
 20 has no witness and/or direct evidence pertaining to the innerworkings,
 21 operations, and/or servers of the dark websites themselves. (*See* ECF No. 127 at
 22 7 ("At trial, the FBI will attest that the screenshots and videos are true and
 23 correct copies from the dark web servers."). Further, the Government's
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1 investigation disclosed that the dark websites are “scam websites” and “fake.”
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 3 (ECF No. 121-1 at 8.)

4 Various authorities cited by the Government provide stronger
 5 circumstantial evidence regarding authentication and/or involve records
 6 custodians for the medium of communication. *United States v. Lamm*, 5 F.4th
 7 942, 946-48 (8th Cir. 2021) (“Facebook certified” the records and the issue was
 8 whether “the Government may authenticate social media evidence with
 9 circumstantial evidence linking the defendant to the social media account.”);
 10 *United States v. Barber*, 937 F.3d 965, 969-70 (7th Cir. 2019) (person who the
 11 defendant corresponded with via Facebook Messenger “directly identified the
 12 pertinent messages” and the issue was whether it was “error to admit Facebook
 13 records linked to an account that [defendant] says is not his”); *United States v.*
 14 *Isabella*, 918 F.3d 816, 843 (10th Cir. 2019) (websites were not the medium of
 15 communications plotting the alleged crime and were only offered “to prove [the
 16 defendant] knew [the victim] was a minor”); *United States v. Barnes*, 803 F.3d
 17 209, 217-18 (5th Cir. 2015) (witness “testified that she had seen [the defendant]
 18 use Facebook” and the “content of the messages were largely duplicative” of
 19 various witness testimony). None of these authorities allow the Government to
 20 authenticate the dark web messages and conduit websites via circumstantial
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1 evidence that law enforcement allegedly accessed some of the messages and the
 2 websites at a later time. *See id.*

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 4 Furthermore, the Government argues that *United States v. Vayner*, 769 F.3d
 5 125 (2nd Cir. 2014) somehow supports the theory that “viewing a website and
 6 capturing screenshots” is a proper way to authenticate electronic evidence.
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 8 (ECF No. 127 at 5.) In *Vayner*, the law enforcement officer could not
 9 authenticate a website just by testifying that “he saw [the website] and this is
 10 what it says,” despite that “the agent does not know who created it.” 769 F.3d at
 11 131. The Second Circuit compared the website with a flyer found on the
 12 street—even though either might contain details regarding an individual,
 13 evidence regarding the creation thereof is necessary. *See id.* at 132.

14
 15 In the situation at hand, evidence regarding the creation, maintenance, and
 16 operation of the dark websites is necessary to authenticate both the websites and
 17 the purported messages. Fed. R. Evid. 901(a).

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 20 **C. The Alleged Dark Web Messages, Transcript, and Dark Websites Are**
Inadmissible Hearsay.

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 22 Hearsay is an out-of-court statement, offered therein, to prove the truth of
 23 the matter asserted. Fed. R. Evid. 801(c). Here, the dark web messages,
 24 transcript, and websites are all clearly offered for the truth of the matter

1 asserted—that the dark websites offered criminal services for hire, the unknown
 2 source(s) developed a criminal plot with “Scar215,” and the unknown source(s)
 3 correctly identified Dr. Ilg in the transcript “Notes.”
 4

5 First, the Government argues that the unknown source(s) statements in the
 6 dark web messages “serve the non-hearsay purpose of providing context for
 7 Defendant’s admissions.” (ECF No. 127 at 11.) However, “invoking the word
 8 ‘context’ does not permit an end-run around the hearsay rules such that the
 9 government may smuggle into evidence all [the informant’s] statements,
 10 particularly when they overwhelm the defendant’s.” *Vo*, 766 Fed. Appx. at 549.
 11 Here, the “context” of the dark web messages, websites, and transcript hearsay
 12 in total overwhelm the statements purportedly from Defendant. Similarly,
 13 “context” is inapplicable when the hearsay portion of the conversation recites
 14 preexisting facts as a portion of the conversation. *See United States v. Smith*,
 15 816 F.3d 479, 482 (7th Cir. 2016) (noting that the “context” exclusion is
 16 inapplicable for the hypothetical— “[Informant]: Last week I paid you \$7,000
 17 for a letter that my client will use to seek a grant for a daycare center. Do you
 18 remember? [Defendant]: Yes.”). Further, the purported “context” here is
 19 clearly offered for the truth of the matter asserted—that Dr. Ilg allegedly
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1 solicited a hitman from the dark web, developed a plot with the hitman, and
 2 ultimately transferred bitcoin via the dark web. *See id.*

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 4 The cases cited by the Government for its “context” argument are clearly
 5 distinguishable. *See United States v. Dupre*, 462 F.3d 131, 137 (2d Cir. 2006)
 6 (reasoning that “[t]he messages demonstrated that defendants had received
 7 communications detailing the project’s likely bogus nature,” when the project
 8 was separate from the communications); *United States v. Whitman*, 771 F.2d
 9 1348, 1351 (9th Cir. 1985) (reasoning that informant’s statements during
 10 recorded conversation with defendant planning murder that occurred at later
 11 time not offered for the truth); *accord Lamm*, 5 F.4th at 948-49 (noting that
 12 exhibits were “offered to explain why [defendant] communicated with another,
 13 unknown account” and “to show that [defendant] had access to and was familiar
 14 with the . . . account”). Here, the charged crime is the dark web correspondence
 15 themselves, which are offered for the truth and do not simply provide “context.”

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 17 Second, the Government argues that the messages document “Defendant’s
 18 state of mind,” which purportedly consists of “his intent for the hitmen to kidnap
 19 and extort his estranged wife.” (ECF No. 127 at 12.) However, the “state of
 20 mind” hearsay exception is only applicable to show the “declarant’s then-
 21 existing state of mind.” Fed. R. Evid. 803(3). As such, statements by the

1 unknown source(s) cannot speak towards Defendant's alleged state of mind. *See*
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3 *United States v. Clarine*, 138 Fed. Appx. 940, 943-44 (9th Cir. 2005)
4 (unpublished) ("statements made by a declarant are only admissible to the extent
5 they demonstrate the *declarant's* state of mind").
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8 Third, the Government seems to suggest that the business records
9 exception is applicable. (*See, e.g.*, ECF No. 127 at 4.) For the business records
10 exception to apply, the dark web evidence must have been "kept in the course of
11 a regularly conducted activity" and may not "indicate a lack of trustworthiness."
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13 Fed. R. Evid. 803(6)(B), (E). As such, the business records exception should
14 not be applied to dark web records as a matter of policy. *See id.* Further, the
15 foundation for the business records exception must be "shown by the testimony
16 of the custodian or another qualified witness." Fed. R. Evid. 803(6)(D).
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21 **CONCLUSION**
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23 Dr. Ilg respectfully requests that the Court grant Defendant's Motion to
24
25 Exclude Dark Web Messages and Websites

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27 RESPECTFULLY SUBMITTED this 15th day of July, 2022.
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29 By: /s/ Andrew M. Wagley
30

31 Carl J. Oreskovich, WSBA #12779
32 Andrew M. Wagley, WSBA #50007
Attorneys for Ronald C. Ilg, MD

CERTIFICATE OF SERVICE

I hereby certify that on July 15, 2022, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF System, which will send notification of such filing to all attorneys of record in this matter.

EXECUTED in Spokane, Washington this 15th day of July, 2022.

By: /s/ Andrew M. Wagley
Andrew M. Wagley